Safety Kleen Oil Services, Inc., a wholly-owned subsidiary of Safety Kleen Corp. *and* Daniel Tamucci *and* John Fisher *and* David Jackson. Cases 22–CA–16922, 22–CA–16984, and 22–CA–17081

August 12, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 23, 1991, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by promising to keep its Linden, New Jersey facility in operation if the employees rejected the Union in an upcoming Board election. The General Counsel has excepted to the judge's failure to find that the Respondent also violated Section 8(a)(1) by threatening employees with discharge for engaging in protected concerted activities and by soliciting employee complaints and promising to remedy them. We find merit in the General Counsel's exceptions.

a. *The threat*. The Respondent is engaged in the collection and recycling of hazardous waste materials. The Respondent's drivers transport the waste oil and are paid a base salary plus a commission based on the amount of oil collected. In January 1990,[2] the Respondent announced to its drivers that they would have to charge customers 5 cents per gallon to collect their oil. A few weeks later, the Respondent informed the drivers that beginning January 29, they must test for halogen at each pickup and charge the customer for the cost of the test. The drivers complained to Supervisor Anton Tantalos that they felt these changes would turn away customers and result in decreased commissions.

On January 29, the day the testing requirement was to go into effect, all the drivers called in sick. That same day, the drivers met with a representative of Local 575, Automatic Sales, Servicemen and Allied Workers, a/w International Brotherhood of Teamsters, AFL–CIO[3] (the Union) and each signed a union card. Later that day, employee Daniel Tamucci informed Tantalos that the drivers had talked to a union representative, signed union cards, and decided to seek union representation. Tantalos reported this conversation to his supervisor, Gary Farrar. Farrar responded that the Respondent would never put up with ''having a union vote come in'' and that all the drivers would be fired before the Union came in.

Farrar arranged a meeting with the drivers for the following day. Farrar, Vice President of Personnel Bob Burian, and Personnel Manager Kevin McKenzie met Tantalos at the Linden facility prior to meeting with the employees. Tantalos told them that all the drivers had signed union cards and were seeking union representation.

Six employees testified about the meeting and gave similar accounts of what was said. Burian told the drivers that he knew the drivers had ''pulled a workstop'' and that he knew about the Union. He stated that there was no way he would agree to having a union in Safety Kleen. Burian then said that they were ''playing hardball with the big boys,'' and that he would ''close them down in a minute.'' He added that if they did not like what was happening with the Company, he could tear up their contracts and they could go work for another oil collection company. The drivers also testified that they told Burian about their problems with the testing requirement and the nickel charge, and that he promised to provide training on the halogen testing and guaranteed the employees that they would be paid 90 percent of their commission.

Burian testified that he opened the meeting by asking the drivers where they were the previous day and by stating that he did not believe they were sick. He then stated, ''You obviously have some major complaints or concerns, otherwise I don't believe you were sick. I believe you all took off, and you did it concertedly.'' When the drivers said that they were sick, Burian said that ''if you want me to sit down and listen to your problems you guys are going to have to be big boys.'' Burian testified that he chastised Supervisors Farrar and Tantalos in front of the drivers, asking them ''how the hell could they be running a business and not listening to employees, because I felt that their complaints were legitimate.''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III, par. 29 of the judge's decision, he stated that employee Ronald Mills had to wait at Hitchcock to have his oil offloaded from 6 p.m. until 1 a.m.; in fact Mills testified that he worked from 6 a.m. until 1 a.m. We correct this error.

[2] All dates are in 1990 unless otherwise indicated.

[3] The name of the Union has been changed to reflect the new official name of the International Union.

The drivers who attended the meeting were suspended for the day by Burian and were not paid for that day or the day of the sickout.

Although the judge agreed with the General Counsel that the sickout was to protest the change in working conditions, he did not find that the threat to ''close them down in a minute'' violated Section 8(a)(1) because, in the judge's view, the threat referred to their sickout and the fact that he knew they were not sick. The judge found that this statement did not rise to the level of an 8(a)(1) violation. We disagree.

The Board has held that an employer's threat to discharge employees if they engage in a strike or other protected work stoppage violates Section 8(a)(1) of the Act. *Robertson Industries*, 216 NLRB 361 (1975), enfd. 560 F.2d 396 (9th Cir. 1976). The General Counsel argues that the Respondent's threat following the sickout was aimed at discouraging protected concerted activity. We agree.

The Board has found a sickout to be protected concerted activity in those cases where there is evidence that the employer knew or had reason to know that the employees were not really sick, but were engaged in a work stoppage to protest their working conditions. See *Toledo Commutator*, 180 NLRB 973, 977–978 (1970) (employer was aware that employees who left the facility were engaging in a group protest over the lack of response to their previous complaints); *Citizens Trust Bank*, 206 NLRB 320, 323 (1973) (employer knew or had grounds for the belief that the employees were dissatisfied with their wages and were likely to take further concerted action).

Here, Burian acknowledged at the January 30 meeting that he knew the employees were not sick and that he was aware that they were acting concertedly to protest their working conditions. The drivers told Burian their concerns about the testing and the 5-cent charge and he acknowledged that these were legitimate complaints. Because the Respondent knew that the sickout was to protest the changes in the drivers' working conditions, we find that his threat could reasonably be understood as a threat to penalize protected concerted activity. Accordingly, Burian's threat to ''close them down in a minute'' if they engage in such protected conduct violated Section 8(a)(1) of the Act.

b. *Solicitations of grievances and promises to remedy them*. We also agree with the General Counsel that the Respondent violated Section 8(a)(1) by soliciting grievances and promising to remedy them. The judge failed to discuss this allegation. The drivers, whom the judge found ''generally, to be credible witnesses,'' testified that at an employee meeting on the day after the sickout Burian stated that it was obvious that the employees had major complaints, and he asked what they were. The employees told him about the 5-cent charge and testing requirements. Burian stated that these were legitimate complaints and should have been dealt with sooner. At the end of the meeting, Burian promised to provide training and a 90-percent commission guarantee. The drivers further testified that at that meeting Burian also stated that he knew that the drivers had gone to the Union and there was no way he would agree to have a union represent them.[4] Thus, we find that at the time that Burian solicited the employees' grievances and promised to remedy them, he was aware that the employees had contacted a union.

It is well settled that an employer interferes with the Section 7 rights of employees by soliciting employee grievances and promising to remedy them during a union organizational campaign. *Nissan Research & Development*, 296 NLRB 598, 610 (1989). Accordingly, we find that the Respondent violated Section 8(a)(1) by soliciting employee complaints and promising to remedy them.

2. For the reasons stated below, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Robert Ott.

On May 3, the Respondent suspended Ott, allegedly for being absent from work for 7 days in 1990, for collecting a load of oil containing 50-percent water on April 23, and for causing $250 in damage in an automobile accident on April 27. On May 11, the Respondent informed Ott that his performance was ''inadequate'' and that he was terminated. Farrar testified that it was costing the Respondent too much to keep Ott employed.

The judge found, and we agree, that under *Wright Line*[5] the General Counsel established a prima facie case that Ott's union activity was a motivating factor in the Respondent's decision to discharge him.[6] In finding that the Respondent failed to meet its burden under *Wright Line* to show that it would have discharged Ott even in the absence of the employee's union activity, the judge stated that while the asserted reasons for the discharge ''would normally be grounds for termination,'' he was convinced otherwise. In agreeing with the judge that the Respondent failed to rebut the General Counsel's prima facie case, we do not rely on that statement. Rather, we find that the Respondent's asserted reasons for discharging Ott involved conduct of a sort that the Respondent had not

[4] Tantalos, whom the judge found to be an articulate and credible witness, testified that he and Farrar met with Burian prior to meeting with the drivers and informed him that the drivers had signed union cards. While Burian testified that he was unaware that the employees had contacted the Union as of the January 30 meeting, the judge found that Burian was not ''a particularly credible or convincing witness.''

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] In its brief, the Respondent does not appear to dispute this finding.

previously treated as grounds for discharge and that the Respondent therefore treated Ott in a disparate manner.

As to the 50-percent water pickup, Ott testified that he had no way of disputing the amount of water in that load, but that the Respondent could deduct the amount of water from his total gallons in determining his earnings, as had been done in the past. Ott testified that he picked up three loads on the day the water content was found to be high, and that the largest was at Rucci Oil. Ott testified that he tested this waste oil as it was going into the truck and found nothing wrong. The record indicates that other drivers who collected loads containing over 50 percent water were never disciplined as a result, and that Ott was not warned prior to his suspension that his load on that day had an unacceptably high water percentage.

As to the accident, Ott testified that he was involved in two accidents while driving for the Respondent and in neither case was he warned that this conduct could result in termination. Most significantly, the record shows that other employees have been in similar accidents and not been as severely disciplined. Jackson testified that he was in an accident in 1989 which resulted in $700 worth of damage. He was suspended for 3 days without pay. Davis testified that he drove into a display and planter at Goodyear, causing $150 in damage, and was not disciplined. Tantalos testified that the only driver to be discharged for his driving record was involved in an oil spill and, on a separate occasion, a five-car accident that resulted in serious bodily injury and totally damaged cars.

As to his absenteeism, the judge found that Ott was unsure whether he was absent 7 days in 1990, but that he could have been. Ott testified that he was never warned by the Respondent that his absenteeism was a problem. Other employees with a record of absenteeism were not discharged or given as severe discipline. Fisher testified that he was absent 7 days in 1990 and late on one occasion, and was only given a reprimand. The record shows that Fisher was also late for work several days in November 1989 for which he was suspended 1 day.

The record indicates that Ott was treated disparately from other employees who had similar work-related deficiencies. Thus, we find that the Respondent does not normally treat the asserted problems as grounds for discharge. Therefore, we conclude that the Respondent has not established that it would have discharged Ott in the absence of his union activities. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by its treatment of Ott.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusions of Law 4 and 5 and renumber the subsequent paragraphs.

''4. The Respondent violated Section 8(a)(1) by threatening employees with discharge for engaging in protected concerted activities.

''5. The Respondent violated Section 8(a)(1) by soliciting employee complaints and grievances and promising to remedy them.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Safety Kleen Oil Services, Inc., a wholly-owned subsidiary of Safety Kleen Corp., Linden, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Promising to keep a facility open if the employees withdraw their support from the Union.''

2. Insert the following as paragraphs 1(b) and (c) and reletter the subsequent paragraphs.

''(b) Threatening employees with discharge for engaging in protected concerted activity.

''(c) Soliciting employee complaints and grievances, and promising to remedy them.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT promise to keep the Linden facility open in exchange for your withdrawing support from Local 575, Automatic Sales, Servicemen and Allied Workers, a/w International Brotherhood of Teamsters, AFL–CIO or any other labor organization.

WE WILL NOT threaten employees with discharge for engaging in protected concerted activity.

WE WILL NOT solicit your complaints and grievances, and promise to remedy them.

WE WILL NOT discharge, constructively discharge, close a facility, or otherwise discriminate against you because of your membership in, or activities on behalf of, the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employees Daniel Graham, John Szpilka, Robert Ott, David Jackson, John Fisher, Emanuel Davis, and Ronald Mills immediate and full reinstatement to their former jobs or, if those positions

no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them with interest.

WE WILL remove from our company records any reference to the unlawful discharges and constructive discharges of the above-named persons, and notify each of them in writing that this has been done and that the unlawful discharge will not be used against them in any way.

SAFETY KLEEN OIL SERVICES, INC., A WHOLLY-OWNED SUBSIDIARY OF SAFETY KLEEN CORP.

Tracy Galligan, Esq., for the General Counsel.
Richard J. Delello, Esq. and *Steven S. Glassman, Esq. (Grotta, Glassman & Hoffman, P.A.)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Newark, New Jersey, on 5 hearing days commencing April 22, 1991, and concluding on June 19, 1991. The second amended complaint, which issued on January 2, 1991, was based on unfair labor practice charge, and an amended charge, filed by Daniel Tamucci on April 5 and 10, 1990,[1] John Fisher on May 4 and David Jackson on June 15. The complaint alleges that Safety Kleen Oil Services, Inc., a wholly owned subsidiary of Safety Kleen Corp. (Respondent), violated Section 8(a)(1) of the National Labor Relations Act by impliedly threatening its employees with discharge for engaging in union or other protected concerted activities, solicited employee complaints and grievances, and promised its employees improved terms and conditions of employment. The complaint also alleges that Respondent threatened its employees with unspecified reprisals because of their membership in, and activities on behalf of, Local 575, Automatic Sales, Servicemen and Allied Workers, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), and promised its employees that their compensation would not be reduced, as had previously been announced, and that their terms and conditions of employment would improve if they rejected the Union as their collective-bargaining representative. The complaint further alleges that Respondent violated Section 8(a)(3) of the Act by discharging Daniel Graham and John Szpilka on April 5, Robert Ott on May 11, and David Jackson on June 5. It is further alleged that Respondent violated Section 8(a)(3) of the Act by terminating its business operation at its Linden, New Jersey facility on about May 7 and imposing more onerous working conditions on John Fisher, Emanuel Davis, and Ronald Mills by requiring them to travel a longer distance in the performance of their work, which resulted in the constructive discharge of these employees on about May 9 (for Mills and Fisher) and June 6 (for Davis).

On the entire record, including the briefs received and my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent maintains a facility in Linden, New Jersey (the Linden facility), where it is engaged in the business of collecting waste oil. During 1990 Respondent purchased and received at the Linden facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

There are four 8(a)(1) allegations. The first two allegations involve a speech that Robert Burian, the senior Vice President of Administration and human resources for Safety Kleen Corp. (SKC), made to Respondent's drivers (also called sales services representatives) at a meeting on January 30; the complaint incorrectly alleges that this meeting took place on February 6. It is also alleged that on about March 20 Burian threatened these employees with unspecified reprisals because of their union activities and that on April 3 he promised that their compensation would not be reduced as had previously been announced and that their terms and conditions of employment would be improved if they rejected the Union as their collective-bargaining representative. The complaint further alleges that Respondent unlawfully discharged employees Daniel Graham and John Szpilka on April 5; Daniel Tamucci was also discharged on that day, but as this matter was satisfactorily resolved by the parties, the allegation regarding his discharge was withdrawn. The complaint also alleges that Respondent unlawfully discharged Robert Ott (on about May 11) and David Jackson (on about June 5), and constructively discharged John Fisher and Ronald Mills (on about May 9) and Emanuel Davis (on about June 6).

SKC is engaged in the collection and recycling of hazardous waste materials in 49 States. The basic operational level is the branch office, headed by a branch manager, and there are 164 of these throughout the country. This system works its way up to regions, divisions, and SKC's principal office in Elgin, Illinois. SKC operates six lines of business: parts washing, paint refinishing, dry cleaning, fluid recovery, antifreeze collection and waste oil collection. Not all branches have all of these operations. The employees involved here are involved only in the last of these business operations. SKC became involved in this business principally through the purchase and acquisition of existing companies, some large, some small. An example of the former was its purchase of Breslube, Inc., a Canadian company, in 1987, by Respondent. This was the start of this business and was followed by the purchase of numerous smaller waste oil collec-

[1] Unless indicated otherwise, all dates referred to herein relate to year 1990.

tion businesses, including County Waste Oil, which was owned by Tamucci. Respondent's drivers drive their trucks around a specified area soliciting facilities such as gas stations, auto dealerships, and anybody else with used oil. They then transfer the oil to their truck and, usually, at the end of the day, offload the oil at a facility of Respondent or another company, similarly engaged. It would be the latter situation if Respondent had previously determined to sell the waste oil to a unrelated company, rather than retain it in one of its tanks. The principal reasons for Respondent to sell the oil to another company are that it lacks storage tanks in the area or that market conditions make it more profitable to sell the waste oil. Subsequently this waste oil is shipped to a location where it is recycled or rerefined and then sold.

When Respondent purchased County Waste Oil in about June 1988, it hired Tamucci, its owner, as well as Anton Tantalos who worked with Tamucci. Tamucci was given a 1-year employment contract, in addition to direct monetary compensation for his company. Tamucci serviced parts of Westchester County in New York and Fairfield County in Connecticut; Tantalos covered other parts of Westchester County as well as Putnam County. Initially, Tamucci parked his truck at his home in Westchester County, did his route, usually filling his truck, and offloaded the oil at Hitchcock Oil, (Hitchcock) (unrelated to Respondent), in Bridgeport, Connecticut. Tamucci testified that, at times, it took four to six hours to offload at Hitchcock. From about October through December 1988, Tamucci offloaded his oil onto a rented trailer at a Ryder Truck Rental facility in Stratford, Connecticut (adjacent to Bridgeport). The trailer then took the oil to an SKC facility in Medina, Pennsylvania, where it was offloaded into storage tanks. In about January 1989 Respondent arranged for its drivers (including Tamucci) to offload their oil at Nassau Oil (Nassau) in Brooklyn, New York. Although Nassau was unrelated to Respondent, Respondent maintained a trailer at the Nassau facility for its drivers and supervisors. From this time until about December 1989, some of Respondent's drivers offloaded their oil at Nassau. From January through about December 1989 Tamucci left his home, collected his oil until his truck was filled or almost filled and then drove to Brooklyn where his truck was offloaded at Nassau, and returned home with his truck. This was the period of Respondent's expansion in the area; numerous drivers were hired and Tantalos was promoted from driver to regional manager of the area.

Graham began his employ with Respondent in February 1989; he lived in Yonkers, New York, in Westchester County and initially covered Rockland, Orange, Sullivan and Ulster Counties in New York. About 2 months later, when Tantalos was promoted from driver to area regional manager, Graham began to service Westchester, Putnam, and Dutchess Counties in New York, and Danbury and Ridgefield Counties in Connecticut. For the first two weeks of his employment, he offloaded and left his truck overnight at Nassau; subsequent to that, Respondent arranged for him to park his truck overnight at a Ryder Truck Rental lot near his home in Yonkers. For the next 6 months he parked at this facility with his truck full, drove to Nassau in the morning and offloaded his truck, did his route, parked the truck at the Ryder lot, and drove his car home. In about December 1989, Tantalos told him that Respondent had decided that he would no longer park his car at Ryder (either because it wasn't safe or legal); from that time to the conclusion of his employment with Respondent, he parked at an SKC branch in Thornwood, in mid-Westchester County, New York. This branch did not and does not have a waste oil collection operation. The other change, at that time, was that he and the other drivers began to offload at an SKC facility in Linden, New Jersey. His procedure during this period was to take his truck from the Thornwood branch in the morning, do his route and fill his truck (hopefully) with used oil, drive to Linden to offload and return to the Thornwood branch where he parked his empty truck and drove his car home. Because he and the other drivers had to wait so long at Linden to be offloaded, this often resulted in a 16-hour day for him. Since the drivers are paid salary plus commission and he was not paid for the extra time, he complained to Tantalos about this delay at Linden. Tantalos arranged for the drivers to be paid an additional $30 a load to compensate for the delay. After about 2 weeks of offloading at Linden, (Tamucci testified that he only offloaded there on one occasion) Tantalos hired a ''jockey'' to drive Graham and Tamucci's trucks from the Thornwood branch to be offloaded at Linden at night. The procedure for both Tamucci and Graham from about December 1989 until they were fired on April 5, was for them to pick up their empty truck in the morning at the Thornwood branch, drive their route and return their full truck to the Thornwood branch and return home. In their absence, the jockey drove their trucks to Linden, offloaded, and returned the trucks to the Thornwood branch where Graham and Tamucci picked them up the next morning. Respondent paid the jockey.

Szpilka began working for Respondent as a driver in July 1989; his route was Suffolk County, Long Island, New York. Originally, he reported for work and offloaded at Nassau; from about January 1 until his discharge on April 5, he reported to, and offloaded at, Linden. He testified that offloading at Linden could take as much as 6 hours, not including driving. Originally, Szpilka parked his truck overnight at a Ryder facility in Amityville, Long Island. Shortly thereafter, Tantalos Amityville (that does not have a waste oil collection operation) for Szpilka to park his truck overnight at the branch. Fisher began his employ with Respondent as a driver in September 1989; at this time, he reported for work and offloaded his truck at Linden. His route was northern New Jersey; he lived in Pennsylvania. His procedure from the date he began until about May was to drive his car from his home to Linden, where he picked up his empty truck. He took his truck on his route, returned to Linden, did his paperwork and left the truck to be offloaded by the employees at the facility and he returned home in his car. Because Respondent was operating both Linden and Nassau for offloading at the time, Charles LoPiccolo was, generally, the supervisor at Linden while Tantalos was at Nassau. George Green began his employ as a driver for Respondent in November 1989. Like Fisher, he began reporting to, and offloading at, Linden, and was supervised principally by LoPiccolo. His route was, originally, New York City and was subsequently expanded to include all of New York State. Davis began working for Respondent as a driver in August 1989; originally, his area was Bergen and Passaic Counties in New Jersey and Rockland County in New York. Subsequently, Passaic County was taken away and Orange County, New York was added. From the time he first began until about May, he reported to the

Linden facility, took his truck, covered his route, and returned his truck to Linden by 5 p.m. He left it and it was offloaded and ready for him to take it the next morning. His supervisors were LoPiccolo and Tantalos. Ott began working for Respondent as a driver in July 1989; his route was, originally, Brooklyn and Queens. He was originally based at Nassau, where he picked up his truck, performed his route and returned to Nassau where his truck was offloaded while he waited. Beginning about January 1, he reported to Linden, where he picked up his truck in the morning, did his routes, and returned the truck to Linden at the end of the day, where it was offloaded in his absence. Jackson began working for Respondent in August 1989 as a driver; the area he covered was Morris and Hunterdon Counties in New Jersey. From the time he began working for Respondent he reported to, and offloaded at, Linden. He picked up his truck in the morning, covered his route and returned to Linden where his truck was offloaded. Tantalos and LoPiccolo were his supervisors. Mills began working for Respondent as a driver in June 1989; he covered Union, Essex, and a part of Hudson County in New Jersey. He worked out of Linden, where his truck was offloaded. All of the above drivers are alleged as discriminatees except for Tamucci (whose case was settled prior to trial and withdrawn from the complaint) and Green. The only other driver for Respondent during the period in question was Noel Hann.

The events were, apparently, precipitated by two changes Respondent instituted in the working conditions of these drivers: the institution of a 5-cent-a-gallon charge for picking up the used oil and a requirement that the oil be tested by the drivers prior to receipt. When Respondent began operating in the area, in order to generate business and clientele, it was paying its ''customers'' between 5 and 10 cents a gallon for the oil it picked up. In about October or November 1989 Tantalos informed the drivers that they should stop that practice Farrar, vice president of Respondent, told Tantalos that the drivers would have to commence charging the customers 5 cents a gallon for all oil taken. When he informed the drivers of this new requirement, they were upset because of the perceived effect this would have upon their earnings. In addition, shortly thereafter, Respondent informed the drivers that they would have to test all the oil picked up to make sure that it did not contain water or other contaminants. The drivers were also concerned about this, fearing that testing would slow up their collections and require them to refuse to accept some contaminated oil, which would also affect their earnings. Farrar testified that Respondent instituted the testing requirement to prevent the collection of oil with too large a water content. Respondent, occasionally, sends its drivers to collect water (known as a water run), but in an ordinary oil collection, too much water is unsatisfactory. In an effort to alleviate the driver's concerns about this testing requirement, Respondent guaranteed the drivers 90 percent of their usual pay during the early stages of this testing period. The drivers were not satisfied with this. In addition to these two changes, the drivers were also concerned about Respondent's plan to ''integrate'' them into its branch network. Historically, Respondent has developed new business lines and when it was felt that they were ready, these new lines were ''rolled out'' and integrated into the branches in the area. This meant that the employees would be supervised by the branch manager and their salaries would be adjusted to be consistent with the existing salaries at the branch. In about late 1989 the drivers learned that they would be integrated into one of SKC's branches sometime during 1990 and they were fearful of the affect that it would have on their pay.

In late January the drivers discussed among themselves their dissatisfaction with the 5-cent charge and the new testing requirement. With the exception of Tamucci and Graham, they all offloaded and reported to Linden and that is where their discussions took place. They also discussed these concerns with Tantalos and spoke to Tamucci and Graham over the phone about these complaints. As a result of these discussions, the drivers engaged in a 1-day sickout on Monday, January 29. During the prior week, all the drivers (including LoPiccolo, who was a driver as well as assistant manager) were discussing different possible action they could take to protest the 5-cent charge and the testing requirement. Picketing the Linden facility was discussed, but rejected. Instead, all the drivers (except Szpilka) and LoPiccolo met at a diner on January 29. Later that day they met at Green's house and met with the representatives of the Union at a nearby diner and signed authorization cards for the Union. All, or almost all, the drivers had called in sick that day and late in the day. Tamucci told Tantalos that the drivers were meeting with a representative of the Union because of their discontent with the 5-cent charge and the testing requirement. Tantalos had been in contact with Farrar throughout the day about the absence of the employees. After hearing from Tamucci, Tantalos called Farrar. He testified that he told him what Tamucci had said and that Farrar was upset that they had gone to a union. Farrar told Tantalos that he was upset with him for not being aware of what was taking place and that he thought that Tamucci was the ringleader and that the company would never put up with having a union. He said: ''They would all get fired before the Union would come in.'' He told Tantalos to call all the drivers and tell them not to come in the following morning, but to come in that afternoon when there would be a meeting at Linden, and Tantalos did so. Farrar testified that in his telephone conversations with Tantalos on that day, Tantalos never mentioned the Union and he never said that he thought that Tamucci was the ringleader or that the company would never put up with a union and all the drivers would be fired first. Burian testified that when he learned of the sickout on January 29, he arranged to go to the Linden facility the following day, and he did so. He also arranged for Farrar to meet him there.

The meeting with the employees was scheduled for about 2 p.m. on Tuesday, January 30. Tantalos testified that Burian, Farrar, and Kevin McKenzie, employee relations manager for SKC, arrived earlier in the day to meet with him. They met at the Linden facility and went out to lunch while discussing the situation. Tantalos' testimony regarding these discussions is far from a model of clarity. On direct examination, he testified: ''I think they found out at that point that they all signed union cards and they were very, very upset . . . .'' When asked how they knew, he testified: ''I guess I had told them that . . . .'' In answer to questions on cross-examination, he testified that they told him to be careful in what he said to the drivers, but they did not elaborate. He also testified that earlier that day, Farrar told him that if he had known that the drivers had signed union cards, he would have fired them. Farrar testified that he never made such a statement. Burian testified that at the lunch meeting

they reviewed the drivers' complaints and he criticized Farrar for not listening to the drivers because they had valid complaints. They agreed that they would rectify the complaints, principally by proper training for testing. He testified that he never said that he would fire the drivers if he had known that they signed union cards; in fact, he didn't yet know of their union activity. The parties stipulated that the Union filed a petition to represent these employees on February 5; Respondent alleges that it didn't learn of the Union until it received this petition a few days later.

There is substantial testimony, often conflicting, about what was said at this January 30 meeting with the drivers. Tamucci and Graham did not attend. Fisher testified that Burian said that he knew they engaged in a work stoppage and he knew that they weren't sick. He said that they were playing in ''big boys school. It's hard ball.'' He said that he would close them down in a minute. He testified that Burian knew that they went to the Union or he assumed that he knew. Burian asked why they engaged in the work stoppage and the employees told him about the 5-cent charge and the testing requirement and how it affected their pay. He told them that they wouldn't have to test and that he would discuss it further with Farrar. Green testified that Burian said: ''We are all big boys and we are playing hard ball here.'' He also said that they shouldn't all get sick again and that he knew that they went to the Union. Szpilka testified that Burian said that he knew that they went to the Union and ''now you are playing hardball with the big boys.'' He said that there were no unions at SKC and there was no way that he would agree to have a union represent them. Davis testified that Burian told them that they had engaged in a strike; he knew that they weren't sick. He said: ''You are now playing in big boy's school. If you want to play hard ball, you are messing with the wrong person.'' He then reminded the drivers that they had all signed employment contracts with Respondent when they began their employ. He offered to tear up those contracts for any driver who wanted to go to work for a different company. Ott testified that Burian opened the meeting by saying: ''This is bullshit. We're in big boy school now and this has got to stop.'' Jackson testified that Burian described their sickout as ''a bunch of bullshit'' and that he knew that they weren't sick. He said that if the drivers ever take off again like they did on the prior day they would be fired. Mills testified that Burian opened the meeting saying: ''You are in big boys school now'' and told them that there were no unions at SKC and that he wouldn't stand for one representing them. He also said: ''We know that you guys went to a union,'' but the employees denied it. The employees complained about the 5-cent charge and the testing requirement; Burian agreed that they should have received some training on the testing before being required to do it, and he asked them to try it for a month and he would get them some training. He also told them that Respondent would guarantee them 90 percent of their commission to compensate them for the charge and the testing.

Tantalos testified that Burian said that he was there to listen to their complaints and that he had previously been unaware of the 5-cent charge and the testing requirement and that he would see what he could do to straighten out the situation. He also told the drivers that they didn't need a union, that SKC didn't have any union representing its employees and that they wouldn't tolerate a union for the drivers. Burian testified that when this meeting took place he had no idea that the employees had gone to a union and it was not mentioned at the meeting. He arrived before Farrar and told the employees that he believed that they were not sick the prior day. He said: ''I came down here because there is a problem. If you want me to sit down and listen to your problems you guys are going to have to be big boys.'' He asked what the problems were. When they told him of their grievances he said that they had legitimate complaints, but used the wrong method of objecting to the problems. He told them that he and Farrar would arrange for them to be properly trained for testing. He also told them that they had no valid complaint about the 5-cent charge; other area charge three or four times as much for oil pickups. Finally, he told them that they would be integrated into the branch network ''come hell or high water.''[2] He also informed them that he was angry with Farrar and Tantalos for not communicating properly with the drivers regarding their complaints. Later that day a notice was posted on the bulletin board of Respondent's trailer at Linden, stating that the drivers would receive a 90-percent commission guarantee and they would receive training in the near future. Farrar testified that Tantalos picked him up at the airport that day and he arrived at the meeting while Burian was speaking. There was no mention of a union and they told the drivers that they would provide them with the proper training and a 90-percent guarantee on their commission.

The first of these training sessions for the drivers took place at the Raddison Hotel in Newark on February 14; although there was some testimony regarding this meeting, there are no allegations that anything said at this meeting is violative of the Act and so it will not be discussed further. Tantalos testified that sometime in February, he met with Farrar at Farrar's office in Breslau, Canada. He testified that Farrar asked him who was the ringleader for the Union and who he felt was in favor of the Union. Tantalos told him that a lot of the drivers left other jobs to take drivers' positions with Respondent with the understanding that they would be earning a good salary, but were later told that they would be integrated into the branches and wouldn't make as much in the future and they were unhappy about it. Farrar said that ''he couldn't wait'' until Respondent was integrated into SKC so that it would be ''out of his hair.'' Farrar asked Tantalos if he thought that Tamucci was the ringleader for the Union and Tantalos said that he didn't think so, he thought that it was a group decision of most of the drivers. Farrar called Tamucci an ''asshole'' for risking the loss of his $80,000 earnings. Farrar then named all the drivers and asked Tantalos how each would vote in the Board election. Tantalos said that he thought that all the drivers, except Hann and Green, would vote in favor of the Union.

There was also testimony about a meeting that Burian held with the drivers at the Linden trailer about 2 days prior to the election. Fisher testified that, at this meeting, Burian said that he would do everything in his power to keep the Union out: ''He would not stand for it.'' He then testified: ''They tried making us promises to keep it out.'' The promise was that the drivers would remain at Linden for 1 more year

[2] He testified: ''come hell or high water, union, no union, whatever.'' Then he added: ''This was at subsequent meetings.''

''guaranteed.'' When one of the drivers asked him to put it in writing, he refused. Burian also said something about salaries, but Fisher could not remember what it was. Davis testified that Burian said that if they didn't vote the Union in, they wouldn't be integrated into the branches and their salaries would not be affected until January 1, 1991. One of the employees asked him to put this guarantee in writing and he said: ''Absolutely not.'' He said that a union was the worst thing that could happen and they wouldn't tolerate it. Mills testified that Burian said that if they didn't vote in the Union he would keep the Linden facility in operation. The balance of his testimony about this meeting was imprecise; all he could recollect was Burian saying that he wouldn't put up with a union and ''would close us down.'' He could not be any more specific. Burian testified that he spoke to the drivers (except for Tamucci, Graham, and Szpilka) at the Linden trailer on April 3. He told them to give integration a chance; that SKC's other employees who were rolled out into branches were happy with the operation. ''But I said, why don't you just give it a chance and see how it goes.'' He made no promises to them that they would remain at Linden and wouldn't be integrated until January 1991; they asked for such a guarantee, but he refused to give it. He did tell them that he would do everything in his power to keep the Union out.

Burian testified that upon receiving the Union's petition, he determined that the unit requested (apparently, the Linden drivers) was not appropriate for a number of reasons. Principally, the Linden facility was not a branch, but was ''an expedient way to enter the market place in New York before integration.'' In addition, these employees would soon be integrated into a branch of Respondent. Finally, Tamucci, Graham, and Szpilka were not in this unit since they did not park at the facility. Counsel for Respondent, by letter dated March 8, wrote to the Board's Regional Office requesting that the petition be dismissed because Respondent ''will eliminate its oil collection activities out of Linden and either transfer or lay off all affected oil collection drivers.'' Attached documents are alleged to establish that some of the drivers would be laid off while others would be offered positions with SKC at locations throughout the region. At the Board conference the parties stipulated to an election to be conducted on April 5. The election agreement is not in evidence so I do not know if the unit description is any more specific than the Linden drivers. When asked on cross-examination why he entered into this agreement rather than contesting the unit which he alleges is inappropriate, Burian testified: ''We didn't think going through the whole hearing process and probably go up to the full Board . . . was going to be worth all the legal fees involved.''

The Board election took place on April 5; the ballots of Tamucci, Graham, and Szpilka were challenged because they were not on the eligibility list prepared by the Respondent. Tamucci testified that a week prior to the election he learned that Respondent had omitted his name from the eligibility list. The election result was five in favor of the Union, two against and, apparently, five challenged ballots, although this is not entirely clear from the record, nor is it clear who, other than Tamucci, Graham, and Szpilka, would have been challenged. Tantalos testified that minutes after the election results were announced Burian approached him and told him to fire Tamucci, Graham, and Szpilka. Tantalos asked Burian what reason he should give them for being terminated and Burian said that he should tell them that they were ending the oil collection operations out of the Thornwood and Amityville branches where they parked their trucks. Tantalos testified that he was surprised at this decision because Tamucci and Graham were the best producers (they collected the most oil in the area and, possibly, in the east coast). He was also previously unaware that Respondent was going to cease its oil collections out of these branches. As directed, he informed Tamucci, Graham, and Szpilka that they were being terminated and that was their last day of employment with Respondent. For, at least the next few months (Tantalos was, fired about a month later), their routes were covered by Tantalos (who hadn't done a route himself for almost a year), Fisher, Hann, Ott, and Joe Kriscie, one of Respondent's managers from North Carolina, who came to the area to assist them. Tantalos testified, further, that subsequent to his discharge he met one of Respondent's oil collection drivers who was working out of the Branford, Connecticut branch. The driver told him that he lived in Briarcliff, Westchester County, New York. When Tantalos remarked that he had a long haul, the driver (whose name Tantalos could not remember) told him that ''once in a while'' he parked at the Thornwood branch. He did not say whether he had authorization to park there.

Tamucci, Graham, and Szpilka agree with this testimony of Tantalos; shortly after the election results were announced Tantalos told them that they were being terminated. Tamucci said that Tantalos told him that the reason he was given was that the trucks could not park at the branches because it was not environmentally safe. Tamucci testified that this was ''absolutely bull''; he testified that trucks belonging to the Thornwood branch were parked overnight at the branch even though they contained contaminated solvents, the same as his truck. He testified that he parked his truck inside the fenced in area at the Thornwood branch when there was space available. If there was no space available, he parked outside the fence, on the street. Graham testified that after Tantalos told them that they were being terminated, Szpilka asked why, and he said that it was environmentally unsound to park the trucks at the branches. That was the first time he heard that. He testified, like Tamucci, that he parked inside the fenced in area when space was available at the branch. About half the time there was no space available and he parked in a driveway at the branch. By letters dated April 6, Respondent informed Tamucci, Graham, and Szpilka that, pursuant to their employment agreements with Respondent (the letter states that Tamucci's agreement is dated June 16, 1988; no dates are given for the other two agreements), their employment with Respondent will terminate on May 17 (for Tamucci and Graham) and July 23 (for Szpilka, presumably because his agreement was executed on July 23, 1989, and was for a 1-year period). The letter further states that they have no obligation to perform future services for Respondent and that they are not to come to the premises of Respondent or SKC and that their paychecks for the remaining period would be mailed to them. The letter concludes by reminding them of the noncompetition restriction contained in their employment contracts (within a 100-mile radius of New York City for 2 years). The letter gives no reason for their discharge.

Burian testified that these employees were terminated for a number of reasons: Respondent had been unable to obtain permits for the Thornwood and Amityville branches to construct and maintain tanks for the storage of waste oil and Respondent had decided that waste oil collection would not be rolled out into these two branches. He further testified: ''We had too many drivers at that time anyway,'' and that whereas all the other drivers were based out of Linden, Tamucci, Graham, and Szpilka parked at these branches, but were not managed by the branch managers: ''We were very concerned as to who was overseeing these three guys . . . We were very apprehensive about having three people floating and not having supervision.'' Between the filing of the petition and the Board conference he decided that they would be terminated for these reasons. He testified that at the Board's informal conference he informed the Union and the Board agent of this decision. He waited until after the election to fire them for labor relations reasons: if he fired them prior to the election the other employees would have felt that they had no job security and would probably have voted for the Union. Farrar testified that he learned from Burian that the trucks would no longer be parking at the Thornwood and Amityville branches. He testified: ''probably most of the pressure [for these terminations] came from our environmental department.'' The principal reason was that they were unable to obtain permits to construct waste oil collection tanks at these branches and they had ''serious concerns . . . relative to the security . . . . '' When he realized this, he didn't seriously consider transferring them to Linden because: ''in my opinion, [they] were operating at an insufficient level of productivity . . . .'' He felt that the existing trucks could assume their business. He testified further that an additional reason for terminating Tamucci was that, as part of his agreement to sell County Waste Oil to Respondent, Respondent agreed to pay him an amount in excess of his regular earnings, and Respondent wanted to save this amount.

Tantalos, Fisher, and Jackson each testified that Tamucci and Graham collected the most oil of all of Respondent's drivers in the area. They were aware of the amounts because each driver was required to write the amount of his daily pickups on a bulletin board at the Linden facility.

As stated above, one of Respondent's principal defenses regarding the terminations of Tamucci, Graham, and Szpilka is that they parked their trucks at the Thornwood and Amityville branches of SKC, and Respondent was unable to obtain the required permits for the construction of waste oil tanks at these branches. It is undisputed that they parked their trucks at these facilities for their convenience and efficiency and had no other connection with the facilities: they were not supervised by the branch manager and their output was not considered production by that branch. Also as stated above, in the past, Tantalos and Tamucci had parked their trucks (sometimes full) at their homes. Farrar testified that Tamucci, Graham, and Szpilka complained about the amount of driving that they had to do when they were offloading at Nassau and the Linden facility and, as a result, Respondent decided that as a ''stop-gap measure'' they would allow them to park at these branches. This decision was based on Respondent's belief that ''ultimately we would be able to have tank storage and construction completed at these branches.'' This turned out not to be correct.

Ott began working for Respondent on July 25, 1989; he offloaded at Nassau until about January 1, when he began reporting to, and offloading at, Linden. From that time until he was fired in May he reported to Linden, where he left his truck which was offloaded in his absence. On May 3 he was told by Farrar that he was being suspended because of excessive absenteeism, 50 percent water in one of his pickups and an accident that he had with his truck. Ott told Farrar that he had no way of disputing the amount of water present in one of his truckloads of waste oil, but if he wished, he could deduct the amount of water from his total gallons in determining his earnings. Farrar refused this offer. He testified that he was never previously warned about being disciplined for a high water percentage. By letter dated May 7, Ott was informed that he was ''hereby put on suspension, indefinitely'' for three reasons:

> 1) A driving accident that is described by yourself as your fault, we are presently awaiting the police accident report.
>
> 2) Year to date you have seven days of being absent, which is entirely unacceptable.
>
> 3) On April 23, 1990, a load of used oil collected by you after being tested resulted in 50% water, which is also entirely unacceptable.
>
> You will be notified further of your status of employment . . . .

By letter dated May 11, Respondent informed Ott that his performance during his employment with Respondent was ''inadequate,'' and that he was terminated from employment.

Ott testified that he was involved in two accidents while driving a truck for Respondent: the first occurred in September or October 1989. In that situation his truck swerved on wet pavement and ''nicked'' a car; it was determined to be an unavoidable accident. The other accident occurred on April 27; in this occurrence he parked his truck at a bus stop. Somebody parked behind him and when he attempted to back up to exit the space, he was unable to see the car behind him and he hit the front grill of the car. At the time he was suspended there had been no definite amount of damages determined, but he testified that it couldn't have been in excess of $100. Jackson testified that he was involved in an accident in September 1989 which resulted in $700 worth of damages; he was suspended for three days without pay. As to his absenteeism, Ott was unsure whether he was absent seven days in 1990, but he could have been. The remaining reason he was given for his discharge was that one of his oil pickups on April 23 contained 50 percent water. He testified that after receiving the letter of May 7 he checked his record which showed only three pickups on April 23; one, Rucci Oil, was, by far, the largest pickup of the day. This was one of Green's customers, but he was out sick that day and LoPiccolo assigned him to do the pickup. At this pickup he tested the waste oil as he usually did and found nothing unusual about the waste oil going into his truck. As to whether his load on that day was 50 percent water, he testified that Respondent has these records, so he doesn't know, but it was possible. Tantalos testified that while employed by Respondent he fired a driver who was involved in an accident. It involved five other vehicles, a few of which were totally damaged, and some people went to the hospital. Farrar

testified that he remembers that Ott was absent too often from work, had picked up a load that was 50 percent, water and was involved in an accident for which he was at fault. The accident report states that the estimated amount of damage to the bumper guard and grill of the other vehicle was $250. Farrar concluded from these incidents: ''It was costing us too much to keep him employed.''

Jackson began his employ with Respondent as a driver on August 28, 1989; he always reported to, and offloaded at, Linden until May, when LoPiccolo told him that Respondent was no longer collecting waste oil at Linden and that he was to report to, and park his car and truck at, a Rollins Truck Leasing (Rollins) facility in Newark (along with Mills) and he was to offload his truck at a facility of Lionetti (not related to Respondent) in Old Bridge, New Jersey, about an hour's drive from Rollins. This change resulted in a shorter drive from home to pick up his truck, but additional driving on his run. Under this procedure, he drove his car to Rollins in the morning, did his run for the day, offloaded at Lionetti, and when they had completed offloading his truck, he returned to Rollins, left his truck in that lot, and drove his car home. His performed his paperwork while waiting at Lionetti, or at Rollins, where he changed into and out of his uniform. When he needed certain documents or Respondent's paperwork, LoPiccolo met him at Rollins and gave it to him.

Jackson was fired on June 5; in a letter dated that day and signed by LoPiccolo, Respondent informed him that he was terminated immediately as ''a result of your foul and abusive language directed toward your supervisor. When I inquired as to the relocation of your truck, your response was 'this is bullshit' and subsequently hung up the telephone on me.'' The letter also states that Jackson was given a written ''prior disciplinary notice of possible termination resulting from abusive language towards a supervisor'' on April 24. On that date, LoPiccolo gave Jackson a ''Disciplinary Notice.'' This letter states:

> Please be advised that your recent failure to show up for work on April 17, 1990 due to car trouble is unacceptable. It is your responsibility to be at work punctually, and failure to do so may result in your termination.
>
> In addition on April 16, 18, 19 and 20 you took it upon yourself to leave work early (2 to 3:00 p.m.) due to personal reasons. When I approached you on this subject you responded with yelling and abusive language. Further outbursts from you may also result in termination of employment.

As for the June 5 termination notice, Jackson testified that LoPiccolo called him at home the prior day at about 6 a.m. and asked him why he had not worked the prior day. Jackson asked him what he was talking about, that he had worked the entire prior day. LoPiccolo said that he had spoken to the people at Rollins the prior day and they said that his truck was there the entire day. Jackson said: ''That's bull, I worked all day and I have receipts to prove it.'' He testified: ''I don't say B.S. in full a lot. I mean there's times we have used profanity around each other, but at this particular time, no, I did not.'' LoPiccolo told him that from then on he was to pick up his truck at the Rollins facility in Edison, New Jersey, and Jackson hung up the phone. Jackson worked all of that day as well as June 6; at the end of that day LoPiccolo met him at Rollins in Edison and gave him the June 5 letter. That was his last day of employment for Respondent.

As stated above, the April 24 disciplinary notice refers to his failure to appear for work on April 17 and his alleged leaving work between 2 and 3 p.m. on April 16, 18, 19, and 20 and responding to LoPiccolo with abusive yelling when he spoke to him about this. Jackson testified that on April 16 he informed LoPiccolo that his car was being repaired and that Green would be driving him to work the following day and they would be in late that morning. Both were still reporting to the Linden facility. Green's car would not start on the morning of April 17 after he picked up Jackson, and Jackson called LoPiccolo and informed him of the difficulty. He told him that they would try to make it in and asked if LoPiccolo had any drivers in the area who could give them a lift to work. LoPiccolo said that he didn't and neither Jackson nor Green was able to get to work that day. Green testified that his car overheated and his radiator cracked on the day in question as he was driving Jackson to work. He never made it to work that day and was never disciplined for the absence: ''No one ever said anything to me.'' As to the other allegation contained in the April 24 notice, Jackson testified that at the beginning of April, he told LoPiccolo that he would have to leave work a little early in the middle of April because his children (aged 10 and 11) would be on school vacation; he is a single parent. LoPiccolo told him that he had no problem with that. On the 4 days in question he left work between 3:45 and 4 p.m., not between 2 and 3 p.m., as alleged. Jackson testified further that when LoPiccolo spoke to him about this subject, he said that somebody had been watching him leave work early and had instructed him to write him up for it. When Jackson reminded him that he had told LoPiccolo 2 weeks earlier that he would be leaving earlier on those days and he had said that there would be no problem, LoPiccolo said: ''I have nothing to do with it. This is what they told me to do.'' Jackson testified that he did not use profanity in this conversation.

LoPiccolo testified that Jackson's termination was precipitated by his request that Jackson move his truck to Edison in order for him to ''keep better track of him.'' He testified: ''He gave me a whole lot of trouble.'' He testified that he wanted him to move his truck to Edison because: ''I didn't hear from him as much as I wanted.'' As to who made the decision that he should move his truck, he testified: ''I believe it was my decision.'' When he called Jackson to tell him of the decision, Jackson said: ''This is bullshit'' and hung up the phone on LoPiccolo. He reported the incident to Farrar, who told him to fire Jackson, which he did. LoPiccolo also testified that the April 24 notice was due to Jackson leaving work between 2 and 3 p.m. for personal reasons. When he spoke to Jackson about this, he used abusive language. As to what was said, he first testified: ''He did say bullshit a lot.'' Asked if he specifically remembered what Jackson said on this occasion, he testified: ''He said that I was picking on him and that it was bullshit . . . I believe he also called me an asshole.'' Jackson testified that Tantalos, LoPiccolo, and all the drivers have, at times, used profanity and he knows of no other driver who has been disciplined for it. Mills testified that he has called LoPiccolo a scumbag, asshole, and a jerkoff on two or three occasions

and LoPiccolo used profanity to him; LoPiccolo denies this. He also testified that all the drivers have cursed at LoPiccolo.

In addition to the above terminations that are alleged to violate Section 8(a)(3) of the Act, it is also alleged that Respondent made the job so unpleasant for Fisher, Mills, and Davis that they were forced to quit. That this constituted constructive discharge of these employees in violation of Section 8(a)(3) of the Act. The principal change in working conditions of these drivers (as well as Jackson) that allegedly resulted in their constructive discharges, was the elimination of Linden as a place for the drivers to offload, and leave, their trucks. This is also alleged to violate Section 8(a)(3) of the Act. Burian testified that Respondent acquired the Linden facility, which is 1 of 13 recycling plants operated by Respondent. However, waste oil is not recycled there; it is only dumped by the trucks and collected there until it can be dispersed to one of Respondent's facilities that recycles or refines oil, or sold to a third party. Beginning in about May, Respondent commenced construction at the Linden facility. While conceding that there was construction at the facility at this time, the General Counsel's position is that offloading could still have taken place during the period of construction. The construction permit for this facility was issued on May 29 for a locker and lunchroom building. Although Burian testified that this renovation and construction had been planned prior to the appearance of the Union, the earliest date contained on this application and permit is May 25. Burian testified that the drivers' trailer was right where construction was to begin and was in the center of the construction site, and for that reason Respondent transferred its oil collection drivers from the Linden facility. (The tanks that the drivers offloaded their oil into were about 50 yards behind their trailer and were not affected by the construction) The facility being constructed on the site, while referred to in the permit as a locker room and lunchroom was actually more than that. It was for the recycle center employees who worked with hazardous materials. The locker room was a one-way system of decontaminating them and their workclothes so that when they exited it they were clean and decontaminated and on their way home.

Farrar testified that when Respondent purchased the Linden facility he knew that it was meant to be a temporary repository for the waste oil drivers until they could be integrated into one of its branch offices. He testified that when he learned that the construction at Linden would necessitate that the drivers cease offloading there for a period he had to locate other sources to accept and dispose of the drivers' oil. He was able to locate only two companies that his environmental department would approve of Lionetti in New Jersey and Hitchcock in Bridgeport, Connecticut, and he negotiated prices with these companies. He testified that there aren't many ''players'' in the area and that these were the only two possibilities that were approved. In addition, Lionetti was not large enough to handle all of their oil and that is why Hitchcock was used as well. The only plant owned by Respondent that could have accepted this oil was in Modina, Pennsylvania, west of Philadelphia, which he testified would be a 4- or 5-hour drive. It actually appears to be between 100 and 120 miles from Linden. By inter office memorandum dated April 26, Farrar wrote to LoPiccolo, saying that, effective May 3, Ott, Green, Mills, Jackson, Hann, Davis, and Fisher would offload their waste oil at Lionetti and another company, which would be purchasing the oil from Respondent and that the drivers were to park their empty trucks at the Rollins and Ryder maintenance facilities. On May 2, Farrar sent a similar letter to LoPiccolo naming only Lionetti (the other company had not been approved by Respondent's environmental department) with the effective date of May 7. On May 7, Farrar wrote to LoPiccolo stating that effective that date the above-mentioned drivers would offload at Lionetti in New Jersey and at Hitchcock in Bridgeport, Connecticut. The memorandum does not specify which drivers were to offload at Lionetti and which were to offload at Hitchcock. In about November, Respondent resumed offloading waste oil at Linden, but with only one oil tank whereas there had previously been one or two tanks.

Tantalos was fired by Respondent in April, but he was aware that they were upgrading the facility, ''but nothing that would affect the day to day operations with . . . the oil coming in. However, he doesn't know for sure since he was not present during the period of major construction work.

Mills began working for Respondent as a driver in June 1989; he covered Union, Essex, and part of Hudson County in New Jersey. Until sometime in April he offloaded only at Linden. About a week or two after Tamucci and Graham were discharged, LoPiccolo reduced his route by taking away the Essex County portion and assigned him to collect oil from the routes of Tamucci and Graham. About 2 weeks after the election, LoPiccolo told him that Farrar said that he would no longer be offloading at Linden; that the Linden facility would be closed and he would offload at the Hitchcock facility in Bridgeport, Connecticut, and park his truck in Newark. He testified that after he complained about this, LoPiccolo told him to try it, so on about May 1 he went to Hitchcock to offload. He did his oil pickups and drove to Bridgeport. He testified that he had to wait to have his oil tested and offloaded and it took him from 6 p.m. until 1 a.m. when he returned home after returning the truck to Newark. Shortly thereafter he informed LoPiccolo that he was quitting and gave him 2 weeks' notice. He never made the trip to Hitchcock again. Mills testified to a number of reasons for quitting: he determined that the number of hours he spent driving to and from Hitchcock, and the time there, would reduce his earnings. He also considered that the 5-cent charge and the testing requirement instituted in January would reduce his earnings. For these reasons he quit.

Fisher began working for Respondent as a driver covering the northwestern Jersey area; from that time until a few weeks after the election he offloaded and kept his truck at the Linden facility. Shortly after the election, he was assigned to do some pickups in Szpilka's former territory in Long Island. In addition, about a week or two after the election, LoPiccolo told him that beginning the following Monday, he would park his truck at a Ryder facility in Edison, New Jersey (which was about the same distance from his home as Linden), and offload the truck at Hitchcock in Bridgeport, Connecticut. Under this new procedure LoPiccolo met him every few days at the Ryder facility in Edison and gave him whatever paperwork he needed. Because of this change he had to do his paperwork in the truck and had no place to change out of his uniform and no telephone to call his customers. He went to Hitchcock on one occasion. He testified that LoPiccolo told him to do it in 2

days; to fill up his truck on 1 day and drive to Bridgeport the next day because it was too much to do all in one day. He filled up his truck during the day and parked it at Ryder in Edison. The next morning he drove to Bridgeport, which took 2 hours. He waited for 2 hours while the Hitchcock employees tested his oil; they then sent him ''to the other side of town'' to offload the oil and he returned the truck to Ryder in Edison. He testified: ''So, by the time that you drive there, drive back, everything, you are talking a ten hour day with no commission because you can't pick up oil.''[3] He testified that Lionetti, in Old Bridge, New Jersey, where some of the other drivers offloaded, is, at most, 15 miles from Ryder, in Edison, where he parked his truck. After this, he determined that he could no longer make enough money working for Respondent and he quit a day or two later.

Davis began working for Respondent as a driver in August 1989; he covered northeast New Jersey and Orange and Rockland Counties in New York. He offloaded at the Linden facility from August 1989 through April. He testified that on about May 4, Farrar came to Linden and told the drivers (among other things) that Linden could no longer accept oil on a daily basis and that they would each be assigned a new place to park and a place to offload their oil. Two days later he received a memo from Farrar saying that he would be parking at a Rollins Truck Rental facility in Edison, New Jersey, and offloading at Hitchcock in Bridgeport, Connecticut. For the next month he followed the procedure of taking his truck out in the morning, spending the day filling it up and parking it at Rollins in Edison. The next day he drove to Bridgeport, which he testified took about 2-1/2 hours, spent 3 to 4 hours being offloaded at Hitchcock, and drove back to Edison, using the entire day. For this last month of his employment he therefore had only one productive day out of every two. He quit on June 6 for the loss of pay caused by his working only 1 out of days as well as the ''unbearable working conditions'' of having his truck as an office and having to meet with LoPiccolo in his truck whenever he needed something. In his resignation letter dated June 7, Davis stated only: ''Effective June 6, 1990, I hereby sever the employer/employee relationship between Safety Kleen Oil Services/Breslube and myself.''

LoPiccolo testified that Davis only offloaded at Hitchcock on three or four occasions and after that he changed the system so that he would offload at Lionetti in Old Bridge, New Jersey. He made the change because there were only two drivers left there. Davis never gave him a reason for quitting. Respondent moved into evidence documents stating that on May 29 and 30 and June 5 Davis offloaded oil at Lionetti in Old Bridge, New Jersey.

Of Respondent's drivers who worked throughout this period, only Green and Hann were not fired or had not quit by June; there is little to discuss about Hann as he did not testify and was rarely mentioned. Green testified as a witness for the General Counsel. He began working for Respondent as a driver in November 1989; he covered New York City and then ''started running all of New York.'' He testified that several weeks prior to the election, while he was with McKenzie (SKC's Employment Relations Manager) in the parking lot near the trailer at Linden, he told McKenzie: ''Kevin, you know I am not going to vote for the Union.'' McKenzie answered: ''I know that.'' The reason why he was not going to vote for the Union was that he felt that the agreement that he and the other drivers had with SKC would not allow him to do so and ''I knew that Safety Kleen wasn't going to have a union.'' Up until the time of the election Green was offloading at Linden. A few days prior to the election, McKenzie told him that he would begin offloading at an SKC branch in Fairless Hills, Pennsylvania, about an hour and a half from Linden, and parking his truck at a Ryder facility in Elizabeth, New Jersey. McKenzie and Green went into the main building at Linden where McKenzie called the Fairless Hills plant and told them that Green would be offloading his oil there. Apparently, McKenzie was asked about bookkeeping problems, because he told the Fairless Hills representative that Green's expenses would be handled by the SKC office in Elgin, Illinois. At this time McKenzie said to Green: ''These guys were hurting themselves and they were going to flush themselves out.'' During the period when he was offloading at Fairless Hills and parking at Ryder in Elizabeth, he was the only one of the drivers at these locations and he kept in contact with supervision (principally LoPiccolo) mainly by telephone. During this period he offloaded in the morning. He left Ryder at about 7 a.m. and arrived in Fairless Hills at about 8:30. Offloading took about an hour and a half after they took a sample of the oil and then he returned to his route, principally New York City.

[3] The drivers were paid salary plus a commission based on the amount of oil picked up.

IV. ANALYSIS

There are four 8(a)(1) allegations in the complaint. The first two relate to statements made by Burian at the meeting following the sickout; although the complaint alleges that this meeting took place on about February 6, the evidence establishes that it occurred the prior Tuesday, January 30. It is alleged that at this meeting Burian impliedly threatened the employees with discharge for engaging in union activities and solicited employee complaints and promised its employees improved terms and conditions of employment, in violation of Section 8(a)(1) of the Act. I found the drivers, generally, to be credible witnesses, although, with rare exception, that could not answer questions briefly. Their answers, often, were extended explanations of unasked questions. In addition, their answers were, at times, exaggerated, probably as a result of their continuing anger at Respondent. There are a number of versions of this January 30 meeting, with some unifying points. A number of the witnesses agree that Burian referred to ''hard ball'' and/or ''big boy's school.'' A review of this meeting fails to establish any violations of Section 8(a)(1) of the Act. Burian was tough and threatened to ''close them down in a minute,'' but that was in reference to their sickout and the fact that he knew that they weren't sick. Szpilka testified that Burian said that there was no way he would agree to have a union represent them and Mills testified that he said that he wouldn't stand for a union representing them. These statements do not rise to the level of an 8(a(1) violation and I recommend that the allegations regarding this meeting be dismissed.

It is next alleged that Respondent, by Burian, violated Section 8(a)(1) of the Act, on about March 20, at the Linden facility, by threatening its employees with unspecified reprisals because of their membership in, and activities on behalf

of, the Union. There is no testimony about any such meeting with the employees so this allegation is dismissed. The final 8(a)(1) allegation is that Respondent, by Burian, violated Section 8(a)(1) of the Act, on about April 3, by promising its employees that their compensation would not be reduced, as had previously been announced, and that their terms and conditions of employment would be improved if they rejected the Union as their collective-bargaining representative. Fisher and Mills each testified that Burian said he would keep the Linden facility open (Fisher testified for 1 year) if they voted against the Union. Davis testified that Burian said that if they didn't vote the Union in, they wouldn't be integrated into the branches and their salaries would not be affected until January 1, 1991. Burian denies making any such promises. Of these witnesses, I found Fisher and Davis the most credible although, as stated above, they could not answer briefly and directly. Although Burian is, obviously, a very intelligent and capable executive of Respondent, I did not find him to be a particularly credible or convincing witness, and I would credit the testimony of Fisher and Davis over Burian. The testimony of Fisher and Davis differed. Fisher testified that the promise was to keep the Linden facility open; Davis testified that the promise was that they wouldn't be integrated and their salaries would not be affected until January 1, 1991. This difference is not surprising since the meeting took place over a year before this hearing and the two issues—closing Linden and integration—loosely related for the drivers. I find it more likely that he promised to keep the Linden facility open if they rejected the Union. Such a promise clearly violates Section 8(a)(1) of the Act.

Turning to the 8(a)(3) allegations, the Board set forth the rule to be followed in such cases in *Wright Line*, 251 NLRB 1083 (1980) ''First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.'' I will initially discuss the allegedly unlawful terminations of Graham, Szpilka, Ott, and Jackson; the allegedly unlawful constructive discharges of Fisher, Davis, and Mills will be discussed next.

There is no question that the General Counsel has satisfied his initial burden under *Wright Line* regarding the terminations of Graham, Szpilka, Ott, and Jackson. Graham and Szpilka (along with Tamucci) were discharged 15 minutes after the election in which the Union received more votes than Respondent; Ott and Jackson were fired 1 and 2 months after the election. The discharges of April 5 are especially puzzling; the evidence establishes that Tamucci and Graham were the two best producers of Respondent's drivers and yet the April 6 letter informing them officially of their discharge has an extremely unpleasant tone. It tells them not to come on Respondent's property and reminds them of the noncompetition clause contained in their agreements with Respondent. Respondent never explained what necessitated a tone such as this when these employees allegedly did nothing to cause their termination. Further puzzling is the rush Respondent was apparently in to fire these three employees when there is no evidence that they had to leave the Thornwood and Amityville branches immediately. This is especially true for Szpilka, whose agreement did not expire until late July. Respondent never answered why they didn't let him work until that time rather than keeping him on the payroll for over 3 months without working. I also find faulty Burian's testimony that an additional reason for firing these three employees is that since they were parking at the branches they were unsupervised: ''We were very apprehensive about having three people floating and not having supervision.'' Apparently, Respondent did not have that same apprehension when, in about early May, it stopped dumping at Linden and it had about seven drivers ''floating'' all over the states so that the only way they could meet LoPiccolo was by calling him and meeting him in their trucks. Additionally, in the circumstances here, I cannot overlook the fact that within 2 months of the Board election, about 80 percent of Respondent's drivers were no longer working for Respondent, and one of the remaining drivers (Green) had told one of Respondent's representatives prior to the election that he was going to vote against the Union.

There is also evidence of Respondent's animus toward the Union. Tantalos testified to two occasions (by telephone the day of the sickout and at a meeting in Canada in February) in which Farrar expressed animus toward the Union. Farrar asked him who was the ''ringleader'' for the Union, called Tamucci an ''asshole'' because he assumed that he was the ringleader and said that all the drivers would be fired before Respondent would recognize the the Union. Although Farrar testified that he never made these statements, I found that Tantalos was an articulate and credible witness. Although he clearly favored the drivers over Respondent, and, obviously, resented his treatment by Respondent, I found him to be more credible than Farrar and would therefore credit this testimony. Finally, there is the testimony of Green who, although a witness for the General Counsel, was the most impartial and disinterested of all the witnesses. He credibly testified that a few days prior to the election McKenzie told him that the drivers were ''hurting themselves'' and would ''flush themselves out.'' Other reasons for my finding will be discussed below separately for each of the alleged discriminatees in the discussion of whether Respondent has satisfied its burden for each.

Respondent's principal defense for firing Graham and Szpilka (as well as Tamucci) is that they were unable to obtain permits at the Thornwood and Amityville branches of SKC to construct waste oil tanks and it was environmentally unsafe to park the loaded trucks at these branches. With the exception of Tantalos' testimony that subsequent to the event in question, he met an SKC waste oil driver who told him that ''once in a while'' he parked his truck at the Thornwood branch, there is no dispute with the fact that subsequent to April 5, waste oil drivers were not parking at these SKC branches. Farrar testified, and Respondent's Brief argues, that early in 1990 Respondent realized that these permits would not be granted and that parking full trucks at these branches exposed Respondent to possible liability. Even if true, Respondent never satisfactorily explained why it did not look for an alternative to firing these employees. Prior to the advent of the Union, Respondent went to considerable expense of hiring a jockey to bring Tamucci's and Graham's truck to Linden; this was done solely for the convenience of three drivers. It would seem that subsequently Respondent could have looked for an alternative to firing them, such as locating a Rollins or Ryder facility for them to park and letting

Tamucci and Graham offload at Hitchcock, where they had previously offloaded, certainly more convenient for them than it was for Fisher, Davis, and Mills. This is especially true since the undisputed testimony is that Tamucci and Graham were Respondent's best producers in the area and that Respondent continued to collect oil in the area. Finally, Tantalos' credited testimony that, on two occasions, Farrar said that Tamucci was the ringleader reinforces this finding; if Respondent was looking for a reason to fire him, it would look highly suspicious unless they also fired Graham and Szpilka. Burian testified, and Respondent's brief argues, that at the Board conference he told the Union and the Board agent that Tamucci, Graham, and Szpilka would be fired. However, this, obviously, occurred after the drivers' union activity and Farrar's statements of animus toward the Union and Tamucci and establishes only that Respondent decided, prior to April 5, to fire them. It does not establish that Respondent made this decision for nondiscriminatory reasons. I therefore find that Respondent has not satisfied its burden and that by firing Graham and Szpilka on April 5 Respondent violated Section 8(a)(1) and (3) of the Act.

Ott was fired 1 month after the election, allegedly, because of an accident he had a week earlier, being absent from work for 7 days in 1990 and returning with a load containing 50 percent water on April 23. It is true that on April 27 Ott's truck backed into an automobile and caused about $250 damage to it. It, apparently, is also true that he was already absent 7 days in 1990 and had 50 percent water in a pickup on April 23. Although these are, of course, serious matters and would normally be grounds for termination, two factors convince me otherwise in this matter. Respondent failed to establish that Ott had been previously warned about any such conduct and that it would subject him to termination and Respondent has failed to establish that any other employee has been fired for similar conduct. In addition, if these facts were the sole basis of this hearing I might have found it insufficient for a violation. However, with the animus that Respondent has displayed elsewhere in this record, and the simultaneous terminations by Respondent, I find that these facts correlate with Respondent's other unlawful activity. I therefore find that Respondent has not sustained its burden, and that by firing Ott on about May 3, Respondent violated Section 8(a)(1) and (3) of the Act.

The final unlawful discharge alleged involves Jackson, who was fired on June 5. Jackson's discharge was allegedly caused by a disciplinary notice dated April 24 together with an incident that occurred on June 4. There are two separate situations listed in the disciplinary notice: his failure to report for work on April 17 and the allegation that he left work between 2 and 3 p.m. on April 16, 18, 19, and 20. As to the former, Jackson informed LoPiccolo on the prior day that Green would be driving him to work the following day. Both Green and Jackson testified that Green's car did not work and they could not make it to work, but that Jackson called LoPiccolo and asked if any of Respondent's vehicles were in the area to pick them up and drive them to work. Further weakening Respondent's case is the fact that Green, whose automobile breakdown caused them to be unable to report for work, never received a similar warning. He testified: ''No one ever said anything to me.'' The most obvious reason for this disparate treatment is that Green had previously told McKenzie that he would vote against the Union. As regards the latter allegation in the disciplinary notice, Jackson impressed me as a soft-spoken credible individual, and I credit his testimony over LoPiccolo. I therefore find that he had previously notified LoPiccolo that during the week in question he would have to leave work early to care for his children, and LoPiccolo offered no objection. When he did leave early that week (an hour or two each day) he was written up, not only for that alleged offense, but for using profanity toward LoPiccolo when he was told of the problem. I credit Jackson that he did not use profanity at this time. Additionally, it should be remembered that these employees are truckdrivers living in the real world of working men. These are not diplomats at the United Nations or members of the President's Cabinet. As the testimony establishes, profanity is an everyday occurrence in these situations and, even if it did occur, I am sure that LoPiccolo did not recoil in horror at the utterance of these words.

The alleged ''straw that broke the camel's back'' as far as Jackson's employment was involved, was the early morning June 5 telephone call from LoPiccolo to Jackson. Having found Jackson to be a more credible witness than LoPiccolo, I credit his testimony that he did work the prior day and responded: ''That's bull'' to LoPiccolo's allegation. In the circumstances of this matter, the use of profanity to answer this allegation might have been warranted considering the lengths that Respondent was going to find a reason to fire him. These facts lead to the conclusion that what LoPiccolo told Jackson about the disciplinary notice was true: ''I have nothing to do with it. This is what they told me to do.'' I therefore find that Respondent has not satisfied its burden that Jackson would have been fired even absent the protected activities and find that this discharge violates Section 8(a)(1) and (3) of the Act.

The final allegation involves the alleged constructive discharges of Fisher, Mills, and Davis. Basically, it is alleged that by requiring them to offload at Hitchcock in Bridgeport, Connecticut, Respondent attempted to, and did, make work so unpleasant for them (because of their union activity) that they quit their employment. Respondent defends that required construction at the Linden facility necessitated stopping offloading at that facility, and the only alternate places it could locate were Lionetti and Hitchcock. Lionetti did not have adequate capacity for all the drivers, so some had to offload at Hitchcock for this period. They allege that driving this distance is not uncommon in the industry. There is no dispute about the standard to be followed:

> To establish a constructive discharge the General Counsel must prove two elements, first that the employer imposed intolerable work conditions compelling the employee to leave his or her job, and second that the employer imposed the conditions because of the employee's union activity.

Alaska Cummins Services, 281 NLRB 1194, 1195 (1986); in *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976), the Board used the standard: ''so difficult or unpleasant as to force him to resign.'' The initial question is therefore how intolerable or unpleasant were the working conditions that Respondent imposed on Fisher, Davis, and Mills after the election. From the time they began working as drivers for Respondent they were all parking and offloading at Linden.

That means that their workday began by driving to the Linden facility, taking their trucks on their routes (New Jersey, as well as Rockland and Orange County, New York, West of the Hudson River) and returning to the Linden facility where they left their truck to be offloaded and picked up in the morning. The nonproductive parts of their day are driving to a facility to offload the oil and waiting with their truck while it is offloaded, if they have to wait. These are the two alleged intolerable changes to their working conditions that Respondent imposed on them after the election. Previously, these three employees did not have to wait during this period because they parked their trucks at Linden. At Hitchcock, they did have to wait while their oil was tested and offloaded. They testified that this testing and offloading took about 3 or 4 hours, nonproductive time that they would not have had to spend if they were offloading at Linden.

The other aspect of the allegedly intolerable conditions is not as easy to measure because these drivers had different routes. Mills' route covered Union, Essex, and part of Hudson County, an area encompassing the Linden facility and, apparently, never more than 15 or 20 miles from Linden. Fisher's route was northern New Jersey, whose farthest point was 30 or 40 miles from Linden. Davis' route was northeast New Jersey and Orange and Rockland Counties in New York, an area ranging from 30 to 60 miles from Linden.[4] Subsequent to the election they were all assigned to offload at Hitchcock in Bridgeport; again the additional driving is different for each of them because of their routes. The change was greatest for Mills, whose route had been closest to Linden and was the most southerly. From midpoint of his route to Bridgeport, Connecticut, is approximately 75 miles. It appears that the distance from mid-point of Fisher and Davis' routes to Bridgeport is also about 75 miles. In addition, after offloading at Hitchcock, they had to return to New Jersey to park their truck; Mills parked in Newark, Fisher and Davis in Edison, about 15 miles south of Linden. Finally, as a practical matter, it must be noted that for these drivers to drive to Hitchcock it required them to cross the Hudson River, probably by way of the George Washington or the Tappan Zee Bridges. These are routes that are often slow moving due to heavy traffic, delaying their trips.

These drivers were paid on a salary plus commission basis; their earnings, obviously, depended on their production (the amount of oil they collected) which depended on the amount of time they could spend on the road. To take the most extreme example, Mills was never more than 30 minutes to an hour from Linden; when he finished his route, he drove to Linden, left his truck, and went home. Fisher and Davis, whose farthest points were about an hour to an hour and a half from Linden, also left their trucks there on returning and went home. Under the new system they had to drive about 75 to 90 miles each way, which would take about 2 hours each way, and wait about 3 hours for their oil to be tested and offloaded, for a total of about 7 hours. This represented about 6 hours *extra* of nonproductive time for these drivers for each load of oil. This clearly represents intolerable working conditions so difficult or unpleasant as to cause the employees to quit.

[4] As is probably obvious, I am not a cartographer, but these figures are necessary in this determination, and are as close as I can estimate.

Counsel for Respondent, in his brief, defends that Respondent's drivers offloaded at Hitchcock even prior to the appearance of the Union. However, this involved Tamucci and Tantalos, who lived in Westchester County, New York. The evidence establishes that Tamucci collected oil in this area and lived in Rye Brook, New York, which is about 35 miles south of Bridgeport; this drive is straight up interstate 95, without any bridges to cross, clearly distinguishable from the situations involving Mills, Fisher, and Davis. Counsel for Respondent also challenges the General Counsel's theory of constructive discharge on two additional grounds: that Mills and Fisher only drove to Bridgeport on one occasion and that the earnings of these employees were not adversely affected by the change. As to the former, it is true that Mills and Fisher drove there only once; they testified that the length of time that this required convinced them even after one trip that they would lose too much pay because of this change. In his brief, counsel for Respondent cites *Razco, Inc.*, 231 NLRB 660 in support of his argument that one trip is not enough to support a constructive discharge. In that case the administrative law judge, as affirmed by the Board, found no constructive discharge of employee Zippy, not because she only worked at the new location for 1 day, but because the working conditions at the new location ''measured by the standards of a reasonable person, did not rise to this level of severity.'' Davis testified that he began offloading at Hitchcock beginning on about May 6 and offloaded there until he quit on June 6; because of the amount of time this consumed, he followed a procedure of doing his route on 1 day and spending the following day driving to, and offloading at, Hitchcock. He therefore had only one productive day out of every 2 during this period. To counter this testimony, LoPiccolo testified that after Davis had offloaded at Hitchcock on three or four occasions he transferred him to offloading at Lionetti, New Jersey, where he was at the time he quit. In support of this, Respondent introduced documentary evidence establishing that on May 29 and 30 and June 5, Davis offloaded at Lionetti. I credit the testimony of Davis over LoPiccolo; I found his testimony more open and believable than I found LoPiccolo, and I therefore find that Davis offloaded for the month at Hitchcock. Respondent's documentary evidence establishes only that on 3 days during the latter part of this period he offloaded at Lionetti.

Counsel for Respondent, in questioning Fisher, showed him his payroll records, which established that his pay for the week ending May 4 was his highest earnings for, at least, the prior 6 months. Counsel for Respondent, in questioning Mills, showed him his payroll record, which established that his last paycheck was about $100 higher than his average biweekly paycheck. However, these payroll records do not assist Respondent in defending the constructive discharge defense. Fisher and Mills only drove to Bridgeport on one occasion, so I would not expect it to have much affect on their pay, especially for Mills, who did his route and drove to Bridgeport on the same day. In addition, after Tamucci, Szpilka, and Graham were fired, Fisher, Davis, Mills and Respondent's other drivers were sent to the territory to do their pickups. This would tend to increase their earnings. Finally, Mills testified that his last check was high because it included money Respondent owed him from prior deductions.

The final issue is whether the second test of *Crystal Princeton* has been met in establishing a constructive dis-

charge: whether the change was made because of the employees' union activities. I find that it was. Respondent defends that Fisher, Davis, and Mills were transferred to Hitchcock because construction at Linden foreclosed continuing offloading at the facility. The employees who testified on the subject testified that construction did begin at the Linden facility in May, but that it didn't involve the area where the trailer and oil tanks were, and they could have continued to offload there during this construction period. Burian and Farrar testified that the construction foreclosed the possibility of offloading, although Burian also testified that the tanks were not affected by the construction. Of the documents relating to the construction that Respondent moved into evidence, the application was dated May 25 and the permit was granted on May 29, certainly after the union activity and the Board election, and after Fisher, Davis, and Mills were transferred to Bridgeport. There is no way for me to make a definitive finding of whether offloading could continue at Linden during construction other than to repeat that I have previously credited the testimony of the drivers over Burian and Farrar and have previously found that Respondent had animus toward the Union and the drivers for bringing the Union in. These findings suggest that Respondent used the construction at Linden as an excuse for making the drivers' jobs more difficult. Counsel for Respondent states in his brief that it is a common occurrence and a generally accepted procedure for Respondent, and other similarly situated companies, to sell oil to third parties and this is supported by the record here. Additionally, the evidence fails to establish that any of Respondent's drivers offloaded at Linden between May and November, although this would be difficult to prove since none of Respondent's drivers were there during this period. I have previously found that Farrar expressed animus toward the Union, that Burian made promises to the employees 2 days before the election, contingent on them rejecting the Union, and that during this period McKenzie told Green that the drivers would ''flush themselves out.'' In addition, I have previously found that Respondent discharged Graham, Szpilka, Ott, and Jackson because of their union activities, in violation of Section 8(a)(1) and (3) of the Act. It is not a difficult step from these findings to a finding that Respondent temporarily closed Linden and transferred Fisher, Davis, and Mills to offloading at Hitchcock because of their union activities. As stated above, this was a substantial change for them, one that required almost 7 hours of their time in driving and waiting when their previous drive time to Linden was fairly short and they did not have to wait while the trucks were offloaded. In addition, Respondent offered them no assistance, monetary or otherwise, to alleviate these extra burdens. This compares poorly with Respondent's attitude toward the drivers prior to the election. At that time Respondent gave them a 90-percent guarantee on their wages, a bonus for the time it took while their trucks were offloaded, and obtained a jockey for Tamucci and Graham to save them the time of driving to Linden, waiting for their trucks to be offloaded, and returning to Thornwood. Fisher, Davis, and Mills were offered no such benefit for the additional nonproductive hours they had to spend driving to, and waiting at, Hitchcock. For all these reasons, I find that the second test of Crystal Princeton has been met, that Fisher, Davis, and Mills were transferred because of the union activities and that these constructive discharges violate Section 8(a)(1) and (3) of the Act. I also find that Respondent temporarily closed the Linden facility for offloading waste oil because of the employees' union activity, in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Safety Kleen Oil Services, Inc., a wholly owned subsidiary of Safety Kleen Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by promising to keep its Linden facility in operation if the employees rejected the Union in an upcoming Board election.

4. Respondent violated Section 8(a)(1) and (3) of the Act by firing Daniel Graham, John Szpilka, Robert Ott, and David Jackson because of their membership in, and activities on behalf of, the Union.

5. Respondent violated Section 8(a)(1) and (3) of the Act by constructively discharging John Fisher, Emanuel Davis, and Ronald Mills because of their membership in, and activities on behalf of, the Union.

6. Respondent violated Section 8(a)(1) and (3) of the Act by temporarily ceasing waste oil collection at the Linden facility because of the drivers' union activities.

7. The Respondent did not further violate the Act as also alleged in the second amended complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully terminated Daniel Graham, John Szpilka, Robert Ott, David Jackson, John Fisher, Emanuel Davis, and Ronald Mills, I shall recommend that Respondent be ordered to offer each of them immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to expunge from its files any references to the terminations. It is also recommended that Respondent be ordered to make whole Graham, Szpilka, Ott, Jackson, Fisher, Davis, and Mills for any loss of earnings they suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173. See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). As the Linden facility reopened for waste oil collection in about November, no remedy is required in this regard.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Safety Kleen Oil Services, Inc., a wholly owned subsidiary of Safety Kleen Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising benefits to its employees if they withdraw their support from the Union.

(b) Discharging or constructively discharging its employees, or closing a facility employed by these employees, because of their membership in, or activities on behalf of, the Union.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Graham, Szpilka, Ott, Jackson, Fisher, Davis, and Mills immediate reinstatement to their former positions of employment or, if those positions are no longer available, to substantially similar positions without prejudice to their seniority or other rights and privileges, and make them whole for the loss they suffered as a result of the discrimination in the manner set forth above in the section.

(b) Expunge from its files any reference to these terminations and notify them, in writing, that this has been done and that evidence of this unlawful activity will not be used as a basis for future actions against them.

(c) Post at its facility in Linden, New Jersey, and at all of its facilities in the States of New Jersey, New York, and Connecticut, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(d) Preserve and, on request, make available to the Board or its agents for examination or copying, all records and documents necessary to analyze and determine the amount of backpay owed to Graham, Szpilka, Ott, Jackson, Fisher, Davis, and Mills.

(e) Notify the Regional Director in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed as to allegations not specifically found.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''